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IN THE
COURT OF APPEALS OF INDIANA

TRAM DEVELOPMENT GROUP, INC.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0612-CV-689
	)	
JOSEPH MAGINOT and FLORENCE MAGINOT,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Christina Miller, Presiding Magistrate,
The Honorable Lorenzo Arrendondo, Judge
Cause No. 45C01-0410-PL-239

June 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

TRAM Development Group, Inc., ("TRAM") appeals the trial court's judgment in favor of Joseph[1] and Florence Maginot on their breach of contract action. We affirm in part, reverse in part, and remand.

Issues

TRAM raises three issues, which we reorder and restate as:

I. whether the trial court properly concluded that TRAM breached the contract;

II. whether the trial court properly calculated damages; and

III. whether the trial court properly calculated prejudgment interest.

Facts

On May 18, 2001, the Maginots agreed to sell approximately fifty acres of property to TRAM. The contract provided in part:

> WHEREAS, the Purchaser agrees to purchase from Seller, in accordance with the terms, conditions and stipulations set forth in the Agreement ("Agreement"), that certain real property (the "Real Estate"), with all improvements thereon and all easements, rights-of-way and other appurtenances thereto, located in the Town of St. John, Lake County, Indiana. The Real Estate is a tract of land consisting of approximately 50 acres, located along the North side of Joliet Street (101st Avenue), in the Town of St. John, Lake County, Indiana. . . .
>
> NOW THEREFORE, In consideration of Purchasers agreement to purchase the real estate outlined herein and of

[1] Joseph died prior to trial.

the mutual covenants and promises contained herein, the parties agree as follows:

* * * * *

3. METHOD OF PAYMENT: The entire Purchase Price for the Real estate shall be paid to Seller, in cash, at the time of closing of this transaction, subject to the conditions as contained herein.

a. Seller agrees to convey contiguous acreage to the Purchaser, for period of three (3) years from the date of this Agreement upon the terms and conditions contained herein, however, the purchase price per acre conveyed will be in accordance with the following schedule:

1. Any acreage conveyed to Purchaser before [September 30, 2002], shall be at a purchase price in the amount of Sixteen Thousand Dollars ($16,000.00) per acre;

2. Any acreage conveyed to Purchaser after [September 30, 2002] and prior to [September 30, 2003], shall be at a purchase price in the amount of Seventeen Thousand Dollars ($17,000.00) per acre;

3. Any acreage conveyed to Purchaser after [September 30, 2003] and prior to [September 30, 2004], shall be at a purchase price in the amount of Eighteen Thousand Dollars ($18,000.00) per acre;

4. Purchaser agrees to provide access to any land NOT conveyed to Purchaser by the Seller, via (an) improved access stub(s) from that portion of the land conveyed and platted by the Purchaser[.]

4. FURTHER CONDITIONS: This Agreement to Purchase Real Estate is contingent upon the following conditions:

a. Purchaser obtaining satisfactory evidence of soil suitability from a testing service and/or engineering firm of their choice. Seller grants, by acceptance of this Agreement, permission for Purchaser, or its appointed agents, representatives, employees, contractors, or subcontractors to enter the Property for the purposes of obtaining soils samples, boring or any other material and or information, by required means, necessary for the completion of this suitability evaluation.

If more than [4 acres] of the subject property is found to have unacceptable soil for building construction, then this Agreement may be terminated by Purchaser, without Recourse. The purchaser shall notify Seller of termination in writing whereupon this agreement shall become null and void, and of no further force or effect.

b. On or before [April 30, 2002], Purchaser shall obtain primary approvals from the Town of St. John which will allow for development of the Real Estate in accordance with the Purchaser's plans. The Purchaser shall pay for all of Purchaser's out of pocket costs in conjunction with obtaining said primary approvals. Purchaser further, shall prepare all materials and retain all consulting professionals as may be required to obtain said approvals, at their sole expense.

c. Purchaser completing an acceptable preliminary development feasibility study for the proposed development of the property.

d. Purchaser obtaining satisfactory determination, from the Army Corp. of Engineers, the Indiana Dept. of Natural Resources, or any other governing body, delineating the presence, if any, of wetlands that may be present upon the property. If more than 4 acres of the subject property is found to located within a described wetland, then this agreement may be terminated by Purchaser, without recourse. The Purchaser shall notify Seller of termination in writing

> whereupon this Agreement shall become null and void and of no further force or effect.
>
> e. Purchaser obtaining satisfactory financing for the development improvements.

App. pp. 10-13.[2] Pursuant to the contract, the parties agreed they would not close on 100% of the property in any one calendar year "for purposes of Seller's tax considerations[.]" Id. at 16. On October 4, 2001, the parties executed an addendum to the contract that provided in part:

> b. The parties acknowledge that Purchaser intends to subdivide such real property at a subsequent time, and that Purchaser will attempt, in good faith, to secure necessary and applicable approvals to accomplish this particular land use. Purchaser shall have until April 30, 2002 to secure such approvals. In the event Purchaser fails to secure said approvals on or before April 30, 2002, Seller shall be forever released from the liabilities to sell to Purchaser under any and all of the provisions of this Agreement, unless said time limitations are extended, in writing, by the parties to this Agreement.

Id. at 21.

Between 2002 and 2004, TRAM purchased all but approximately nine of the fifty acres in two separate closings as dictated by the contract. TRAM created a residential subdivision on the property.

In August 2004, TRAM notified the Maginots in writing that it was not going to purchase the remaining nine acres "due to the wet nature of the soils in the area." Exhibit

[2] The altered dates were handwritten in place of the typed dates on the contract.

6. TRAM indicated that the remaining nine acres were not suitable for new home construction.

On October 20, 2004, the Maginots filed a complaint against TRAM alleging breach of contract. On October 24, 2006, after a bench trial, the trial court found in favor of the Maginots. The trial court awarded the Maginots $163,206.00, plus pre-judgment interest in the amount of $28,158.00. The trial court also awarded the Maginots $600.00 in unpaid real estate taxes and the remaining $800.00 of earnest money. TRAM now appeals.

Analysis

Neither the chronological case summary nor the transcript indicate the parties requested findings and conclusions pursuant to Indiana Trial Rule 52(A). Therefore, to the extent the trial court's order contains findings and conclusions, its entry of such was sua sponte. Piles v. Gosman, 851 N.E.2d 1009, 1012 (Ind. Ct. App. 2006). The findings and judgment are not to be set aside unless clearly erroneous, and due regard is to be given to the trial court's ability to assess the credibility of the witnesses. Id. (citing Ind. Trial Rule 52(A)). Although findings are reviewed under the clearly erroneous standard, we do not defer to a trial court's conclusions of law, which are reviewed de novo.[3] Id.

[3] In its brief, TRAM refers to the negative judgment standard of review as applying to all issues. However, one appeals a negative judgment when he or she had the burden of proof at trial. Clark v. Hunter, 861 N.E.2d 1202, 1206 (Ind. Ct. App. 2007). Here, the Maginots had the burden of proof at trial and were successful on their breach of contract claim. They do not appeal a negative judgment; rather, TRAM is the appellant.

I. Breach of Contract

Because our review of the breach of contract claim turns on a question of law, our review is de novo. Orthodontic Affiliates, P.C. v. Long, 841 N.E.2d 219, 222 (Ind. Ct. App. 2006). Unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning. Four Winds, LLC v. Smith & DeBonis, LLC, 854 N.E.2d 70, 74 (Ind. Ct. App. 2006), trans. denied. Where the terms of a contract are clear and unambiguous, they are conclusive. Id. We will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions. Id. The terms of a contract are not ambiguous simply because the parties disagree as to the proper interpretation of the terms. Id. "A contract is ambiguous only where a reasonable person could find its terms susceptible to more than one interpretation." Cummins v. McIntosh, 845 N.E.2d 1097, 1104 (Ind. Ct. App. 2006), trans. denied. If the language of a contract is unambiguous, the parties' intent is determined from the four corners of the document. Id.

TRAM urges that the language in which it agreed "to provide access to any land NOT conveyed to Purchaser by the Seller, via (an) improved access stub(s) from that portion of the land conveyed and platted by the Purchaser[,]" makes clear the parties' intent to protect the Maginots in the event that not all of acreage was conveyed to TRAM. App. p. 12. This language does not create an ambiguity. When reading the contract as a whole, this language simply allows the Maginots to access property that has not yet been sold to TRAM.

Further, although the contract was subject to the satisfaction of certain conditions, the inability to satisfy the conditions permitted TRAM to terminate the agreement in its entirety. The conditions did not permit TRAM to purchase less than all of the fifty acres. TRAM did not assert that the conditions were not satisfied prior to the first closing. In fact, it was only after TRAM purchased the developable forty-one acres that it indicated it would not purchase the remaining nine acres because of the unsuitable soil conditions.

Finally, TRAM argues that because the Maginots were aware that its proposed development did not include the nine acres, they "consented" to TRAM's reading of the contract. Appellant's Reply Br. p. 4. TRAM contends that this is evidenced by the fact that the Maginots did not sue for breach of contract after the second closing. TRAM, however, was not in breach until it failed to purchase all fifty acres by September 30, 2004. After that, the Maginots sued for breach of contract. The Maginots did not consent to TRAM not purchasing all fifty acres.

In sum, TRAM agreed to purchase fifty acres in any combination over a three-year period.[4] If the conditions were not satisfied, TRAM was not required to purchase any of the property. However, the contract contains no provision that would allow TRAM to purchase only as much of the fifty acres property as was developable. Because TRAM opted to proceed under the terms of the agreement when it purchased the forty-one acres, it is bound to purchase the remaining nine acres.

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[4] For example, TRAM could have purchased forty-eight acres the first year, and an acre each in the two remaining years. See Tr. p. 49.

II. Damages

TRAM also argues that the trial court awarded the Maginots monetary damages based on the terms of the contract while allowing the Maginots to keep the property. TRAM asserts that the Maginots did not ask for specific performance in the complaint and that damages should be calculated based on the actual value of the property. The computation of damages is a matter within the trial court's sound discretion. Berkel & Co. Contractors v. Palm & Associates, Inc., 814 N.E.2d 649, 658 (Ind. Ct. App. 2004). "We will not reverse a damage award unless it is based on insufficient evidence or is contrary to law." Id.

Initially, we point out that it is unclear whether the Maginots requested specific performance or damages in their complaint because it was not included in TRAM's appendix. Further, it is unclear whether the trial court awarded the Maginots specific performance or legal damages. The trial court simply ordered judgment in favor of the Maginots in the amount of $163,206.00 ($18,000 per acre x 9.067 acres). The trial court's order was silent as to possession of or title to the property.

Indiana courts order specific performance of contracts for the purchase of real estate as a matter of course because each piece of real estate is considered unique, without an identical counterpart anywhere else in the world. Kesler v. Marshall, 792 N.E.2d 893, 896 (Ind. Ct. App. 2003), trans. denied. However, specific performance is an equitable remedy, and the power of a court to compel specific performance is an extraordinary power not available as a matter of right. Id. "Our courts generally will not exercise equitable powers when an adequate remedy at law exists." Id. at 897.

Here, the choice of remedy is unclear. However, we agree with TRAM to the extent that the Maginots cannot recover the agreed contract price while retaining ownership of the nine acres. That would be a windfall to or double recovery by the Maginots. "The law disfavors a windfall or a double recovery." INS Investigations Bureau, Inc. v. Lee, 784 N.E.2d 566, 577 (Ind. Ct. App. 2003), trans. denied. Nevertheless, TRAM's claims that the Maginots damages are limited to the fair market value of the property are without merit. Generally, a party injured by a breach of contract may recover the benefit of the bargain. Berkel, 814 N.E.2d at 658. Thus, although the Maginots are entitled to be made whole based on TRAM's breach, we remand for the trial court to determine whether specific performance or legal damages[5] is an appropriate remedy, including the proper disposition of title to the real estate at issue.[6]

TRAM also appears to argue that the Maginots failed to mitigate their damages by not continuing to farm the property and by not trying to sell it. Assuming this issue was properly raised before the trial court, the breaching party has the burden of proving that the nonbreaching party has failed to use reasonable diligence to mitigate damages. Id. at 660. The limited evidence that the Maginots farmed the land prior to entering into the agreement with TRAM and that they had not tried to sell it to someone else is not sufficient evidence that the Maginots failed to use reasonable diligence to mitigate damages.

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[5] The Maginots could resell the property and hold TRAM liable for the difference between the actual sale price and the price under the contract. See Kesler, 792 N.E.2d at 897.

[6] On remand, the trial court should also apply the earnest money toward the damages award, as the Maginots do not appear to be entitled to the earnest money in addition to damages.

Finally, TRAM suggests that because the property is of no value to it, an award of damages to the Maginots would amount to unjust enrichment. This argument is waived, however, because it is not supported with cogent reasoning and citation to authority. See Ind. Appellate Rule 46(A)(8); 7-Eleven, Inc. v. Bowens, 857 N.E.2d 382, 390 n.5 (Ind. Ct. App. 2006).[7]

III. Prejudgment Interest

TRAM argues that the award of prejudgment interest was improper because the amount in controversy is not a fixed amount. We review an award of prejudgment interest for an abuse of discretion. Thor Electric, Inc. v. Oberle & Associates, Inc., 741 N.E.2d 373, 377 (Ind. Ct. App. 2000). The crucial factor in determining whether damages in the form of prejudgment interest are allowable is whether the damages were ascertainable in accordance with fixed rules of evidence and accepted standards of valuation. Id. Prejudgment interest is proper only where a simple mathematical computation is required. Id.

Contrary to TRAM's argument, the amount of the Maginots' damages is easily calculated at the contract price of $18,000 per acre for the 9.067 remaining acres, totaling $163,206.00. Pursuant to the terms of the contract, TRAM was to have purchased the last installment by September 30, 2004. TRAM did not do so. In their motion, the Maginots requested prejudgment interest from that date. The trial court granted the

[7] For the first time in its reply brief, TRAM argues, "The court went outside of the contract to impose taxes as part of the damages." Appellant's Reply Br. p. 5. An issue raised for the first time in a reply brief is waived. Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 977 (Ind. 2005) ("The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived.").

Maginots' motion and awarded them prejudgment interest in the amount they requested. We can presume that the trial court found that the sum came due on September 30, 2004. The only question that remained regarding the damages award concerned how the Maginots would be compensated. The award of prejudgment interest was proper.

TRAM further argues that the trial court improperly awarded the Maginots compound, as opposed to simple, interest on the judgment. Indiana Code Section 24-4.6-1-103(b) provides:

> Interest at the rate of eight percent (8%) per annum shall be allowed:
>
> (a) From the date of settlement on money due on any instrument in writing which does not specify a rate of interest and which is not covered by IC 1971, 24- 4.5 or this article;
>
> (b) And from the date an itemized bill shall have been rendered and payment demanded on an account stated, account closed or for money had and received for the use of another and retained without his consent.

In Kirtley v. McClelland, 562 N.E.2d 27, 38 (Ind. Ct. App. 1990), trans. denied, we acknowledged the general rule that compound interest is not allowed as damages. We adopted that general rule and concluded that because the interest award was based on the right to receive interest as damages, the interest should not be compounded but calculated as simple interest. Kirtley, 562 N.E.2d at 38.

Similarly, in addressing the post-judgment interest statute, we observed that the statute clearly applies to "interest on judgments" only and not to interest upon interest on judgments. Nesses v. Kile, 656 N.E.2d 546, 547 (Ind. Ct. App. 1995) (citing Ind. Code §

24-4.6-1-101). We therefore restricted the calculation method to one of simple interest. Id.

Indiana Code Section 24-4.6-1-103 refers to interest on "money due" not interest upon interest on money due. Thus, adopting the reasoning in Kile and Kirtley, we conclude that the trial court improperly awarded the Maginots compound interest. We remand for the calculation of simple interest.

Conclusion

TRAM agreed to purchase fifty acres from the Maginots, not as much or as little property as was developable. We remand, however, for the reassessment of damages and the recalculation of simple prejudgment interest. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and RILEY, J., concur.